THE HON'BLE SRI JUSTICE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION Nos.17986 of 2001 and 10313 of 2003

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COMMON ORDER: (per the Hon'ble Sri Justice Ramesh Ranganathan)

DATE : 2-2-2007

W.P.No.17986 of 2001
Between:

1. The Senior Divisional Electrical Engineer (Maintenance) South Central Railway, Secunderabad and 2 others

. ..... Petitioners

and

1. K.Sudhakar Naidu and 6 others .... Respondents

THE HON'BLE SRI JUSTICE B. PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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COMMON ORDER: (per the Hon'ble Sri Justice Ramesh Ranganathan)

Seeking to have the order of the Central Administrative Tribunal, in O.A.184 of 1995 dated 20.4.2001, quashed, W.P.No.17986 of 2001 is filed by the Senior Divisional Electrical Engineer, South Central Railway and others. Against the very same order, and the consequential proceedings dated 14.5.2003, the unofficial respondents in the O.A, have filed W.P.10313 of 2003.

Consequent upon introduction of an electric traction between Vijayawada and Balharsha, a Traction Distribution Organization (TRD) was set up in the year 1988. This organization comprised of two wings, the Over Head Equipment (OHE) wing and Power Supply Installation/ Remote Control (PSI/RC) wing. While both OHE and PSI wings were manned, at the lowest level, by unskilled, semi-skilled and skilled categories, the starting point for skilled category in OHE wing was Lineman Grade III and promotion was to the higher posts of Lineman Grades II and I. Similarly the starting point for skilled category in PSI wing was Fitter Grade III and

promotion was to the higher posts of Fitter Grades II and I. The respondent–applicants were working in the PSI wing. They were appointed as Fitters Grade III in 1987 and 1988. Respondents 5 to 7 in the O.A. were appointed as Linemen Grade III thereafter on 30.1.1989. All the three respondent–applicants, and respondents 5 to 7 in the O.A, were promoted to Grade I posts on the same day i.e., 1.3.1993.

The entire controversy revolves around their being appointed to Grade II posts and the manner in which their inter-se seniority is to be reckoned for being considered for appointment to the post of Electrical Chargeman Grade B.

The petitioners, in W.P. No. 17986 of 2001, (official respondents in the O.A.), published a seniority list of Skilled Grade III in the OHE wing on 4.2.1991 and thereafter conducted a trade test during April, 1991, consequent to which promotion orders were issued, to respondents 5 to 7 in the O.A, on 30.7.1991. However, for the PSI wing the trade test was conducted only in October, 1991 and thereafter promotion orders were issued to the respondent-applicants on 2.12.1991.

The petitioners, in W.P. No. 17986 of 2001, issued a notification on 13.8.1993 to fill up four vacancies, (3 OC and 1 in the S.T. category), in the post of Electrical Chargeman Grade-B against the 25% limited departmental competitive examination quota. Employees, who had put in a minimum three years of

regular service as artisans as on 13.8.1993, were entitled to appear for the written/viva voce test. Their inclusion in the selection panel was subject to their obtaining the qualifying 60% marks in the written test and in the viva voce, subject to their inter-se seniority in their respective grades of Fitter/Lineman Grade I. Since the respondent–applicants and respondents 5 to 7 in the O.A were all promoted to Grade I posts on the same day i.e., on 1.3.1993, the Railways reckoned their inter-se seniority in Grade II posts and, as respondents 5 to 7 had been promoted earlier to Grade II posts, they were reckoned as seniors to the respondent–applicants. Aggrieved thereby, the respondent- applicants filed O.A.184 of 1995.

The respondent-applicants, who belong to the PSI wing, contend that as conducting of a trade test is a pre-requisite for promotion to the post of Skilled Grade II, and as the trade test for the PSI wing was deliberately delayed, the fortuitous circumstance of a trade test being held earlier for the OHE wing and later for the PSI wing cannot result in employees of the OHE wing, though juniors to similarly placed employees in the PSI wing in Grade III posts, being considered as seniors to them consequent upon their promotions to Grade II posts earlier.

The Tribunal, in its order dated 18.11.1997, held that, since there were vacancies of Lineman Grade II, it was possible that the Railway authorities had felt that filling up these vacancies was essential to maintain the

services even if the seniority list of Linemen Grade II was not issued and, since there may not have been any such necessity in the case of promotion to the post of Fitters Grade II, it was postponed till finalization of the seniority list. The Tribunal took note of the proceedings dated 4.4.1991 which was issued by the Railway authorities in reply to the representation submitted by the 1st applicant in the O.A. on 10.12.1991 calling upon them to finalize the seniority list of Fitters Grade II so that promotions could be effected to the PSI staff. In its letter 4.4.1991, the Railway authorities informed that the respondent-applicant had to wait till finalisation of the seniority list of Fitters Grade II for effecting promotions to Grade II posts. The Tribunal observed that the applicants had failed to so and there was no justification for them to question the seniority list after lapse of three years. The O.A. was dismissed.

Aggrieved thereby, the respondent–applicants filed W.P.671 of 1998 and the Division Bench of this Court, by order dated 18.9.2000, allowed the writ petition. The Division Bench, after going through the pleadings and the order passed by the Tribunal, observed that the discussion in the order of the Tribunal did not suggest that it had applied its mind to the contentions raised before it and that non-consideration thereof vis-à-vis the rule position and the difference between selection by merit-cum-seniority and selection only by merit had resulted in the parties approaching the Court to fight out

the litigation. The writ petition was allowed, the order of the Tribunal set aside and the case remanded for fresh enquiry in accordance with law.

Thereafter the Tribunal, by its order dated 20.4.2001, allowed the O.A. The Tribunal observed that the OHE wing and PSI wing of the TRD were separate and different units with different seniority lists being maintained. The Tribunal, upon noting the contentions urged on behalf of the Railways that the trade test was conducted for the OHE wing much prior to the trade test conducted for the PSI wing, observed that no reasons were stated for the delay in conducting the trade test for the PSI wing. The Tribunal noted their submission that it was on account of administrative reasons that there was a delay in holding the trade test for employees of the PSI wing and held that on account of their delay in conducting the trade test the respondent–applicants' seniority had been affected and that it was not open to the Railway authorities to contend that, on account of administrative delay, they could not conduct the trade test for the PSI wing earlier. The Tribunal observed that the reasons put forth by the Railway authorities, in not conducting the trade test for officials working in the PSI wing at a proper time, was not a ground to deny the respondent-applicants their legitimate seniority. The Tribunal examined the marks list and observed that, though respondent No.6 in the O.A, (who belonged to the OHE wing), had secured 61.5% marks, he was placed

above the respondent-applicants (who belonged to the PSI wing), who had secured 61.7%, 72% and 62% marks in the written test and viva-voce test respectively and that there was no justification in placing the 6th respondent above them. The Tribunal set aside the office order dated 9.3.1994 whereby respondents 4 to 7 in the O.A. were promoted as Electrical Chargeman Grade-B, and directed the Railway authorities to draw a fresh panel duly fixing the inter-se seniority of the applicants in the Higher Skilled Grade II vis-a -vis respondents 4 to 7. The Tribunal observed that non-conducting of a trade test for the PSI wing, at the proper time, should not be taken into consideration for determining seniority. The petitioners herein were directed to prepare a fresh panel of Electrical Chargemen Grade-B duly taking note of the seniority position of the respondent-applicants as well as respondents 4 to 7.

Subsequently, on an application being filed by the petitioners, (the official respondents in the O.A.), the Tribunal, by order dated 13.2.2003, held that the inter-se seniority between the respondent- applicants and the un-official respondents in the O.A. should be determined on the basis of their entry into Grade III posts from which posts they were promoted to Grade II posts, without taking into account the date of passing of the trade test. Consequent thereupon the Railway authorities issued a letter of selection on 14.5.2003, proposing to revise the panel published on 2.3.1994 for the post of Chargeman

Grade-B deleting the names of respondents 4 to 6 in the O.A. and incorporating the names of the respondent-applicants and others duly taking their dates of entry into Grade III posts as the criteria for fixing seniority. Aggrieved thereby, respondents 5 to 7 in the O.A. filed W.P.No.10313 of 2003.

Sri R.S. Murthy, learned standing counsel for the Railways, would refer to the order in **Union of India Vs. R. Chandrasekharan**[1] wherein, while examining the question as to whether inter-se seniority of employees was to count with effect from the date on which they pass the trade test or with effect from the date they were re-classified, the Supreme Court referred to the decision taken by the Ministry of Railways in its orders dated 26.3.1990 that seniority would be reckoned with effect from the date of passing of the trade test and held that in the petition before it the seniority must be recast with effect from the date the respondent had passed the trade test. Learned standing counsel would also refer to the Railway Board's letter dated 26.2.1999 informing that, in view of the judgment of the Supreme Court dated 30.11.1998, in **R. Chandraseharan**[1], seniority was to be reckoned only from the date when they passed the trade test and not from the date of re-classification.

Sri G.V. Shivaji, learned counsel for respondents 5 to 7 in the O.A, would submit that, by its order dated 13.2.2003, the Tribunal had directed that the date of entry in Grade III posts should be the criteria for fixing

inter-se seniority. Learned counsel would submit that it was not for the Tribunal to prescribe the manner in which inter-se seniority, of employees in two different wings, should be prescribed, since these were all matters in the executive realm and for the Railway authorities to decide. Learned counsel would plead equities and submit that respondents 5 to 7, (petitioners in W.P.No.10313 of 2003), consequent on their being appointed as Electrical Chargeman Grade-B in 1994, were further promoted as Junior Engineers Grade-I on 30.7.1997 and that the 3rd petitioner had again been promoted as Superintending Engineer in the year 2006. According to the learned counsel any interference at this belated stage would cause irreparable loss and hardship to respondents 5 to 7 in the O.A and that they should not be made to face the ignominy of now working as Linemen Grade I for no fault of theirs.

Sri M. Surender Rao, learned counsel for the respondent-applicants, on the other hand, would submit that the fortuitous circumstance, of employees in the OHE wing having been made to undergo the trade test earlier and the Trade Test being held later for the PSI wing, could not result in employees of the PSI wing losing their seniority when the delay in holding the trade test was admittedly due to administrative reasons and not due to any fault of the part of the respondent–applicants. Learned counsel would also refer to the representation submitted by one of the respondents, (the first applicant

in the O.A), requesting that the trade test be held to which the Railway authorities had informed him that since the seniority list had not been finalized, the test could not be held immediately. Learned counsel would submit that the delay on the part of the Railway authorities in not finalizing the seniority list, and in belatedly conducting the trade test, could not result in the respondent-applicants losing their seniority on the fortuitous circumstance of the trade test being held earlier for the OHE wing and later for those in the PSI wing. Learned counsel would submit that, since the Tribunal had rightly held that the date of the trade test should not be a factor in determining seniority as it was conducted at different points of time for the two wings, this Court ought not to interfere. Learned counsel would submit that, under Article 226 of the Constitution of India, the High Court would not sit in appeal over orders of the Tribunal and, since the impugned order did not suffer from any illegality, this Court should not exercise its discretion to interfere with the order of the Tribunal. Learned counsel would place reliance on **B. Rama Mohan v. Union of India**[2] and **Major General R.S. Balyan Vs. The Secretary, Ministry of Defence, Union of India**[3]. Learned counsel would also rely on para 320 of the Indian Railway Establishment Manual Volume-I which reads thus:-

320. Relative seniority of employees in an intermediate grade belonging to different seniority units appearing for a selection/non-selection post in higher grade:

When the a post (selection as well as non-selection) is filled by considering staff of different seniority units, the total length of continuous service in the same or equivalent grade held by the employees shall be the determining factor for assigning inter seniority irrespective of the date of confirmation of an employee with lesser length of continuous service as compared to another unconfirmed employee with longer length of continuous service. This is subject to the proviso that only on-fortuitous service should be taken into account for this purpose.
Note:- Non-fortuitous service means the service rendered after the date of regular promotion after due process.

While the requirement of a trade test, for appointment to skilled Grade II posts, is a pre-requisite and candidates who have not passed the trade test cannot claim appointment to Grade II posts, the question which arises for consideration in these writ petitions is not with regards the prescription of a trade test for being appointed to grade II posts, but the delay in holding the trade test for one wing resulting in employees belonging to that wing being placed lower in the seniority list to employees of the other wing wherein the trade test had been held earlier. All the three respondent–applicants and respondents 4 to 6 in the O.A. have passed the trade test. While respondents 4 to 6 in the O.A. passed the trade test earlier, since trade test was held earlier in the OHE wing, the respondent-applicants passed the trade test later only because the trade test was held later for the PSI wing.

In **B. Rama Mohan**[2], the very same para of the Indian Railway Establishment Manual came up for consideration. The Supreme Court held that the total length of service in an equivalent grade held by the employee should be the determining factor. In **R.S.**

Balyan[3] para 68 of the Army Regulations came up for consideration whereunder the relevant date for counting the seniority of an officer, who was fit for promotion, but had assumed office later, was the date when the officer was found fit and was notified in the Gazette notwithstanding his assumption of office on a date later. Both these judgments have no application to the facts of the present case.

The question which arises for consideration in the present writ petition is as to whether the fortuitous circumstance of a trade test being held later for the PSI wing, and earlier for OHE wing, would necessitate the respondent-applicants being placed lower in the seniority list when the delay in holding the trade test for the PSI wing was admittedly for administrative reasons and not on account of any delay on the part of the respondent–applicants. This question did not arise for consideration **R. Chandrasekharan**[1] and reliance placed on the said judgment, by Sri R.S. Murthy, learned Standing Counsel for the Railways, is therefore misplaced.

It is not in dispute that separate seniority lists were maintained for Linemen in the OHE wing and Fitters in the PSI wing and that their channel of promotion was distinct and separate. It is only for being considered for appointment to the post of Electrical Chargemen Grade-B that the inter-se seniority of employees of these two wings was taken into consideration, that too in Grade-II posts. Since the respondent–applicants, and respondents

4 to 6 were all appointed to skilled Grade I posts on the same day, the Railway authorities took the date of their appointment in skilled Grade II posts into consideration for determining their inter-se seniority. As noted above, their dates of appointment to grade II posts was based on the fortuitous circumstance of the trade test being held earlier for the OHE wing and later for the PSI wing.

The seniority of an employee, for being promoted to a higher post, cannot be reckoned on such fortuitous events. In **M.B. Joshi Vs Satish Kumar Pandey**[4] the Supreme Court held that in the absence of any specific rule, the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of service and not on any other fortuitous circumstance. In **Tejinder Singh Sandhu Vs. State of Punjab**[5] the Supreme Court held that the circumstance that the employees took charge of their respective posts in Class I Service on divergent dates was purely fortuitous and cannot affect their seniority. In **Dwarika Prasad Tiwari Vs. M.P. SRTC**[6], the Supreme Court held that if the permanent status is granted to officiating employees without applying the conditions of service only on the basis that such employees were required to work for six months in an officiating capacity, a stopgap arrangement made without following the due procedure for promotions, such a conclusion would be wholly unfair and would allow those who were in a fortuitous

circumstance of being available at a station or depot to be put in charge of a higher post without considering the claims of other eligible employees. In **Calcutta Municipal Corpn. Vs. Sujit Baran Mukherjee**[7], the Supreme Court held that the principle of stepping up of pay was inapplicable to a situation where a junior, on transfer to a different place, was paid extra payment by way of special pay or overtime pay since he had to discharge the duty outside his normal duty or due to special circumstances and that such a fortuitous circumstance would not be a ground for other seniors to claim parity of pay by stepping up of their scale of pay.

The Tribunal rightly held that such fortuitous factors are required to be ignored for determining inter-se seniority. The Tribunal left it open to the Railway authorities to draw a fresh panel duly fixing inter-se seniority, of the applicants in the O.A. vis-à-vis respondents 4 to 7 in the O.A, without taking into account the date on which the trade test was conducted. The order of the Tribunal does not suffer from any illegality necessitating interference of this Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

The subsequent clarificatory order of the Tribunal dated 13.2.2003 must, however, be set aside. The Tribunal had directed the Railway authorities to take the date of appointments in Grade III posts as the criteria for fixing inter- se seniority. Sri M. Surender Rao, learned

counsel for the respondent-applicants would submit that if the fortuitous circumstance, of a trade test being held earlier in the OHE wing and later for the PSI wing, was to be ignored, either the date of initial appointment in Grade III posts or the marks obtained in the written examination and viva-voce test held for selection and appointment to the post of Electrical Chargeman Grade B must be taken into consideration, and since the respondent–applicants were seniors, having been appointed earlier than respondents 5 to 7 in the O.A, in Grade III posts, and had secured higher marks in the written examination and viva-voce held for selection and appointment to the post of Electrical Chargeman Grade B, they would be entitled to be placed above, respondents 4 to 6 in the O.A, in the panel of candidates for appointment as Electrical Chargeman Grade-B.

While the date of appointment in skilled Grade II posts, being the outcome of the fortuitous circumstance of the trade test being held earlier for the OHE wing and later the PSI wing, has rightly being directed by the Tribunal to be ignored, it is not for Courts/Tribunals to prescribe the mode and manner in which inter-se seniority of employees in two wings is to be reckoned, for these are all matters for the competent authority to determine. Suffice to hold that the Railway authorities shall adopt a rational criteria for determining the inter-se seniority of the respondent-applicants vis-à-vis respondents 5 to 7 in the O.A, (employees in two different wings), without

taking into account the fortuitous circumstance of the trade test being held earlier for the OHE wing and later for the PSI wing resulting in employees in OHE wing being promoted earlier, than those in the PSI wing, to skilled Grade II posts.

It is necessary to note that, soon after selections were held in 1994, for appointment to the post of Electrical Chargeman Grade-B, the respondent–applicants have approached the Tribunal by way of O.A.184 of 1995. Pendency of proceedings before the Tribunal, and before this Court to which respondents 4 to 7 were parties, cannot be put against the respondent–applicants to deny them the relief sought for. Merely because respondents 5 to 7 in the O.A. have been promoted to the next higher post of Junior Engineers Grade I, and respondent No. 6 in the O.A. has been promoted to the next higher post of Superintending Engineer during the pendency of proceedings before the Tribunal and this Court, the respondent-applicants cannot be denied the relief granted in their favour by the Tribunal.

The order of the Tribunal, in M.A.829 of 2002 in O.A.184 of 1995 dated 13.02.2003, prescribing appointment to Grade III posts as the criteria for fixing seniority, is set aside. We, however, see no reason to interfere with the order passed by the Tribunal in O.A.184 of 1995 dated 24.1.1991. The Railway authorities shall complete the exercise of preparation of a fresh panel of

Electrical Chargemen Grade-B, after determining the inter-se seniority, of the respondents–applicants and respondents 4 to 7 in the O.A, by adopting a rational criteria and without taking into account the fortuitous circumstance of a trade test being held earlier for the OHE wing and later for the PSI wing, within four months from the date of receipt of a copy of this order.

The order of the Tribunal, dated 13.2.2003 in M.A.828 of 2002 in O.A. No. 184 of 1995, is set aside. Both the writ petitions are dismissed. However, in the circumstances, without costs.

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B. PRAKASH RAO, J

Date: -01-2007

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RAMESH RANGANATHAN, J

ASP

[1] Rev.Petition (Civil) Nos.1354 to 1398 of 1996 in Spl Leave Petition (Civil) Nos.6457-6501 of 1993 dated 30.11.1998

[2] V(2001) SLT 408

[3] VIII (2006) SLT 125

[4] 1993 Suppl(2) SCC 419

[5] (1978) 3 SCC 18

[6] (2001) 8 SCC 322

[7] (1997) 11 SCC 463